

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARY MAYNE

Claimant

VS.

GROENDYKE TRANSPORT, INC.

Respondent

AND

GREAT WEST CASUALTY COMPANY

Insurance Carrier

Docket No. 1,048,281

ORDER

Respondent and its insurance carrier (respondent) request review of the January 26, 2010 preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

ISSUES

Following a preliminary hearing the Administrative Law Judge (ALJ) directed claimant to undergo an independent medical examination (IME) with Dr. Stein for the purpose of obtaining an opinion on the question of causation and treatment recommendations. The ALJ went on to state that if treatment is found to be necessary and causally related, Dr. Stein would be authorized to treat claimant or refer her if he deems necessary.¹ The ALJ deferred the authorization of previous medical and temporary total disability (TTD) pending the receipt of Dr. Stein's IME.

The respondent filed this appeal asserting that to the extent the ALJ's Order is construed to include a finding of compensability, it contends the ALJ erred. Respondent concedes the ALJ has the authority to refer claimant for an IME and that there is no jurisdiction for the Board to entertain any appeal from such an order. However, respondent points out that the ALJ's Order goes on to indicate that treatment is to be provided if "found to be necessary and causally related" (presumably by Dr. Stein). The causal connection

¹ This is the fourth sentence in the ALJ's order.

between claimant's need for treatment and its connection to claimant's work activities was a disputed issue at the preliminary hearing and to the extent treatment is to be provided based upon the ALJ's Order, respondent desires review of this decision.

Claimant maintains this appeal is "premature" and "would request stay of such appeal until such time as Dr. Stein's opinion has been given to all parties."²

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

K.S.A. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues:

- (1) Whether the employee suffered an accidental injury;
- (2) Whether the injury arose out of and in the course of the employee's employment;
- (3) Whether notice is given or claim timely made;
- (4) Whether certain defenses apply.

These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. The Board can also review a preliminary hearing order entered by an ALJ if it is alleged the ALJ exceeded his or her jurisdiction in granting or denying the relief requested.³

In light of the jurisdictional framework set forth above, the ALJ's Order presents a perplexing scenario. Both parties acknowledge the ALJ has the authority to refer claimant to Dr. Stein for the purposes of conducting an IME. And his decision to do so is not an appealable issue.⁴ But the language contained within the Order indicates the ALJ inappropriately delegated to the physician the ultimate determination whether claimant's

² Claimant's Brief at 2 (filed Feb. 26, 2010).

³ See K.S.A. 44-551. Neither party alleges the ALJ exceeded his jurisdiction in this instance.

⁴ *Davenport v. Marcon of Kansas, Inc.*, Nos. 1,034,647 & 1,043,900, 2009 WL 3191384 (Kan. WCAB Sept. 21, 2009); *Dodson v. Peoplease*, No. 1,042,494, 2009 WL 1314337 (Kan. WCAB Apr. 09, 2009).

alleged injuries arose out of and in the course of employment.⁵ An ALJ has not only the jurisdiction but also the *duty* to make an independent adjudication of the facts.⁶

Although the ALJ can request a causation opinion from the physician, it is the ALJ who must then consider that evidence in conjunction with the entire evidentiary record and make the decision whether claimant's injuries were caused by the work-related accident. The ALJ has the statutory authority and duty to make factual determinations in workers compensation cases. That power is vested by statute in the ALJ and cannot be delegated to the physician. It is impermissible for the ALJ to delegate the statutory duty to determine the issue of causation in a worker's compensation case and when, as here, that ultimate decision is improperly delegated, that act gives the Board jurisdiction on appeal. Consequently, the fourth sentence in the ALJ's Order constitutes an impermissible delegation of the ALJ's statutory authority, exceeds the jurisdiction of the ALJ and is stricken from the Order.

With that finding, this member of the Board concludes that the balance of the Order does not contain an appealable issue, as it merely directs Dr. Stein to perform an IME and holds in abeyance any further findings until receipt of his report. Accordingly, the Order, with the exception of the fourth sentence which is hereby stricken, remains in full force and effect.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.⁷ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Thomas Klein dated January 26, 2010, is modified to strike the fourth sentence and otherwise, remains in full force and effect.

⁵ Sosa v. Joy Masonry, Inc., Docket No. 1,034,940 (December 31, 2007).

⁶ See K.S.A. 44-523; K.S.A. 44-534; K.S.A. 44-534a; and K.S.A. 44-551.

⁷ K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of March 2010.

JULIE A.N. SAMPLE
BOARD MEMBER

c: Tamara J. Collins, Attorney for Claimant
Stephen P. Doherty, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge